BLANK PAGE

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

J. H. Wood and J. H. Knowlton, *Appellants*,

v. No. 709

T. S. Lovett, Jr., *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF ON BEHALF OF APPELLANTS

J. G. Burke,
Helena, Arkansas,
Counsel for Appellants.

BLANK PAGE

INDEX

TABLE OF CASES

INDEX—Continued

Statutes Cited

Report of the Opinion of the Supreme Court of Arkansas

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

J. H. WOOD AND J. H. KNOWLTON ..... *Appellants*,

v. No. 709

T. S. LOVETT, JR. ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF ON BEHALF OF APPELLANTS

GROUNDS OF JURISDICTION

Jurisdiction of the Supreme Court of the United States in this case is invoked by appeal to review the judgment of the Supreme Court of Arkansas entered in the above entitled cause on October 21, 1940, upon which rehearing was denied November 11, 1940. It is contended that this court has jurisdiction on appeal because the case is one in which the validity of the Statute of the State of Arkansas, to-wit: Act 264 of the Acts of the General Assembly of the State of Arkansas for 1937, Volume 1, page 933, approved March 17, 1937, is drawn into question by appellants on

the ground that this statute is repugnant to Paragraph 1, Section 10, of Article I of the Constitution of the United States and to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The final decision of the Supreme Court of Arkansas, which is the court of the last resort in all causes in the State of Arkansas, was in favor of the validity of said statute. Therefore, the case is one in which, under the legislation in force when the act of January 31, 1928 (45 Stat. L. 54) was passed, to-wit: Under Section 237 (a) of the Judicial Code (28 USCA, Sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right. Since the passage of the said act of January 31, 1928, a review can be had in this court by appeal in the same manner.

The material provision of the said Act 264 of the Acts of the General Assembly of Arkansas for 1937, Volume 1, page 933, the validity of which is here involved, is as follows: "Section 1. That Act 142 of the Acts of 1935 be, and the same is hereby repealed."

It was contended by the appellants in the courts below, and is now contended here, that under the said Act 142 of the Acts of the General Assembly of Arkansas for 1935, Volume 1, page 402, approved March 20, 1935, which was repealed by the aforesaid act, the appellants had acquired vested rights through contracts with the State of Arkansas for the purchase of certain lands, which contracts had been executed by conveyances of the State, and that the repeal of the said Act 142 unconstitutionally impaired these contracts and deprived appellants of their property without due process of law.

The ruling of the Supreme Court of Arkansas having been adverse to appellants' contentions, an appeal to this court was duly prayed and allowed by the Chief Justice of the Supreme Court of the State of Arkansas on December 17, 1940. Transcript was filed January 21, 1941. Probable jurisdiction was noted by order of this court February 17, 1941.

STATEMENT OF THE CASE

This action was brought in the Chancery Court of Desha County, Arkansas, by the appellee, T. S. Lovett, Jr., as plaintiff, against the appellants, J. H. Wood and J. H. Knowlton, as defendants, for the purpose of cancelling certain deeds from the State of Arkansas to the appellants which were alleged to be clouds on the appellants' title (R. 2-5).

The facts as developed were that the Alliance Trust Company, appellee's predecessor in title, owned all the lands involved in the year 1933. In that year it failed to pay the taxes due the State of Arkansas for the year 1932, payable in the spring of 1933. On June 12, 1933, the date fixed by law, the lands were sold at public sale by the collector of taxes and struck off to the State of Arkansas for want of private bidders (R. 26). After the expiration of the period of redemption allowed by law the lands were deeded to the State by the proper authority on July 18, 1936 (R. 15).

On March 20, 1935, the General Assembly of the State of Arkansas passed Act 142 of the Acts of the General Assembly of Arkansas for 1935, Volume 1, page 402, the material provision of which is as follows:

> "Section 1. Whenever the State and County taxes have not been paid upon any real or personal property

within the time provided by law, and publication of the notice of the sale has been given under a valid and proper description, as provided by law, the sale of any real or personal property for the non-payment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; provided, that this Act shall not apply to any suit now pending seeking to set aside any such sale, or to any suit brought within six months from the effective date of this Act for the purpose of setting aside any such sale."

The effect of this act was to cure such defects as existed in the tax sale in Desha County by which these lands were sold to the State, and to provide that this sale should not thereafter be set aside by any proceedings at law or in equity.

On July 20, 1936, the appellant, J. H. Knowlton, purchased 106.66 acres of these lands from the Commissioner of State Lands of the State of Arkansas in the manner provided by law, and obtained a deed conveying to him the East Half of the East Half of the Northeast Quarter (E½ E½ NE¼) of Section Nineteen (19), and the East Half of the Southwest Quarter (E½ SW¼) of Section Seventeen (17), all in Township Seven (7) South, Range Two (2) East, Desha County, Arkansas (R. 30 and 31). On July 29, 1936, the appellant, J. H. Wood, purchased from the State of Arkansas 240 acres of these lands obtaining a deed from the Commissioner of State Lands conveying to him the Northwest Quarter (NW¼) and the West Half

of the Southwest Quarter (W½ SW¼) of Section Seventeen (17), Township Seven (7) South, Range Two (2) East, Desha County, Arkansas (R. 28 and 29). At the time of these conveyances the said Act 142 of the Acts of the General Assembly of Arkansas for 1935 was in full force and effect and operated to render an attack on these tax titles upon the grounds urged by the appellee in this suit impossible.

On March 17, 1937, the General Assembly of Arkansas enacted Act 264 of the Acts of the General Assembly of Arkansas for 1937, Volume 1, page 933, the material provision of which is as follows:

> "Section 1. That Act 142 of the Acts of 1935 be, and the same is hereby repealed."

On January 10, 1939, the appellee, T. S. Lovett, Jr., acquired a deed from the Alliance Trust Company, the former owner, purporting to convey all these lands to him (R. 20). On January 21, 1939, he brought this suit against the appellants, Wood and Knowlton, for the purpose of cancelling the deeds from the Commissioner of State Lands to each of them and obtaining confirmation of title to the lands. His complaint alleges ten separate reasons why the tax sale to the State of Arkansas was void (R. 4 and 5). Of these alleged irregularities only four were proved, these being as follows:

1. The tax book was delivered to the collector on January 16, 1933, which was after the second Monday in January, the date provided by law (R. 23).

2. The collector of taxes failed to attach his certificate to the delinquent list of unpaid taxes (R. 25).

3. The record does not disclose the date when the delinquent list was filed with the clerk (R. 25).

4. The clerk's certificate to the list of delinquent lands was attached on June 12, 1933, the date of the sale, instead of being attached before that date as provided by law (R. 26).

No proof was advanced to sustain the other allegations of irregularities in the tax sale.

In due course the appellants, Wood & Knowlton, filed separate answers in which each alleged that the defects in the tax sale were such as were cured by the provisions of Act 142 of the Acts of the General Assembly for 1935 above set out, and that this act had the effect of curing the title and vesting the same in the appellants and created a vested right which could not thereafter be disturbed (R. 7, 10 and 11). Later the appellants, Wood & Knowlton, filed an amendment to their separate answers for the purpose of specifically raising the constitutional question here presented. This amendment set out that the said Act 142 of the Acts of the General Assembly of Arkansas for 1935 was in full force and effect at the time of appellants' purchase of the lands from the State of Arkansas, and that the defects and irregularities in the tax sale were of such nature that they were cured and remedied by that act. It was specifically pleaded that Act 264 of the Acts of the General Assembly of Arkansas for 1937 repealing Act 142 of 1935, if construed retroactively, would impair and destroy the vested rights obtained by the appellants by virtue of the deeds from the Commissioner of State Lands and would, therefore, be unconstitutional as impairing the obligation of contracts in violation of Section 10 of Article I of the Constitution of the United States, and as depriving appellants of their property without due process of law in con-

travention of the Fourteenth Amendment to the Constitution of the United States (R. 13 and 14).

Trial in the Chancery Court of Desha County resulted in a decree in favor of appellee, the trial judge specifically ruling that the constitutional questions raised by appellants had been passed upon by the Supreme Court of Arkansas contrary to appellants' contentions (R. 33). On appeal to the Supreme Court of Arkansas this decree was affirmed on October 21, 1940 (R. 35). The opinion of the court by Justice McHaney took specific notice of appellants' argument that the repealing act, being Act 264 of the General Assembly of Arkansas for 1937, was void under the Federal Constitution, but ruled that appellants had no vested rights by virtue of their purchase of the lands (R. 37).

This appeal has been duly prosecuted to this court. It is appellants' contention that the State of Arkansas conveyed to them by virtue of Act 142 of the General Assembly for 1935, a valid and indefeasible title in fee simple, unassailable at law or in equity. The purchase was made while this act was in force and effect and at a time when they had no reason to anticipate its repeal, and the provisions of the law constituted an important inducement to the purchase. Thereafter the General Assembly of Arkansas repealed the law, exposing appellants' titles to fatal attacks to which they were not subject at the time of the purchase. Appellants urge that this constituted both an impairment of the obligation of the contract of purchase with the State of Arkansas, and a taking of the property without due process of law.

ASSIGNMENT OF ERRORS

The appellants will rely on and urge in this brief all of the errors assigned. These are as follows:

1. That the Supreme Court of the State of Arkansas erred in refusing to reverse the judgment of the Chancery Court of Desha County, Arkansas, canceling the deed dated July 20, 1936, from Geo. W. Neal, Commissioner of State Lands, conveying to J. H. Knowlton the East Half, East Half, Northeast Quarter (E½, E½, NE¼) of Section 19, Township 7 South, Range 2 East, and the East Half of the Southwest Quarter (E½, SW¼) of Section 17, Township 7 South, Range 2 East, all in Desha County, Arkansas; and the deed dated July 29, 1936, from Geo. W. Neal, Commissioner of State Lands, conveying to J. H. Wood the Northwest Quarter (NW¼) and the West Half, Southwest Quarter (W½, SW¼) of Section 17, Township 7 South, Range 2 East, in Desha County, Arkansas, and in quieting title to said lands in the appellee, T. S. Lovett, Jr. (Record 41-42).

2. That the Supreme Court of the State of Arkansas erred in holding that as to the aforesaid lands the appellants, J. H. Wood and J. H. Knowlton, acquired no vested rights therein by virtue of the said deeds and of Act 142 of the Acts of the General Assembly of Arkansas for 1935, Vol. 1, page 402, which Act cured defects in the tax sales by which the State of Arkansas acquired title to said lands and was in full force and effect at the time of the execution of said deeds to appellants (Record 42).

3. That the Supreme Court of the State of Arkansas erred in holding that Act 264 of the Acts of the General Assembly of Arkansas for the year 1937, Vol. 1, page 933,

repealing Act 142 of the Acts of the General Assembly of Arkansas for 1935, Vol. 1, page 402, did not unconstitutionally impair the obligation of appellants' contract with the State of Arkansas for the purchase of the aforesaid lands guaranteed to appellants by Art. 1, Section 10, of the Constitution of the United States (Record 42).

4. That the Supreme Court of the State of Arkansas erred in holding that the said Act 264 of the Acts of the General Assembly of Arkansas for 1937, Vol. 1, page 933, repealing Act 142 of the Acts of the General Assembly of Arkansas for 1935, Vol. 1, page 402, did not unconstitutionally deprive appellants of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States (Record 42).

5. That the Supreme Court of the State of Arkansas erred in holding that Act 264 of the Acts of the General Assembly of Arkansas for the year 1937, Vol. 1, page 933, repealing Act 142 of the Acts of the General Assembly of Arkansas for the year 1935, Vol. 1, page 402, did not unconstitutionally deny to appellants equal protection of the laws guaranteed (fol. 58) to appellants by Section 1 of the Fourteenth Amendment to the Constitution of the United States (Record 42).

6. That the Supreme Court of the State of Arkansas erred in holding that Act 264 of the Acts of the General Assembly of Arkansas for the year 1937, Vol. 1, page 933, did not unconstitutionally deprive appellants of vested rights in contravention of Article 1, Section 10, of the Constitution of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States (Record 42-43).

SUMMARY OF POINTS AND AUTHORITIES

I. The effect of Act 142 of the General Assembly of Arkansas for 1935 was to cure all defects in the tax sale and vest a valid title in the State of Arkansas.

(a) Act 142 of 1935 is a curative act.

Carle v. *Gehl*, 193 Ark. 1061; 104 S. W. (2d) 445.

Gilley v. *Southern Corporation*, 194 Ark. 794; 110 S. W. (2d) 509.

Deaner v. *Gwaltney*, 194 Ark. 332, at 335; 108 S. W. (2d) 600.

Lambert v. *Reeves*, 194 Ark. 1109, at 1118; 110 S. W. (2d) 503.

Foster v. *Reynolds*, 195 Ark. 5; 110 S. W. (2d) 689.

Wallace v. *Todd*, 195 Ark. 134; 111 S. W. (2d) 472.

Burbridge v. *Crawford*, 195 Ark. 191; 112 S. W. (2) 423.

Kansas City Life Ins. Co. v. *Moss*, 196 Ark. 553; 118 S. W. (2d) 873.

Sanderson v. *Walls*, 200 Ark. 534; 140 S. W. (2d) 117.

(b) Act 142 of 1935 cured the defects in the tax sale in the case at bar.

(1) The defect that the tax books were not delivered to the Collector on time and the warrant was not attached was cured.

Deaner v. *Gwaltney*, 194 Ark. 332; 108 S. W. (2d) 600.

Gilley v. *So. Corp.*, 194 Ark. 794; 110 S. W. (2d) 509.

Wallace v. *Todd*, 195 Ark. 134; 111 S. W. (2d) 472.

Kansas City Life Ins. Co. v. *Moss*, 196 Ark. 553; 118 S. W. (2d) 873.

(2) The defect that the Collector's certificate was not attached to the delinquent list of unpaid taxes was cured by Act 142 of 1935.

(3) The defect that the record does not show the filing date of the delinquent list was also cured by said Act.

Lambert v. *Reeves*, 194 Ark. 1109, at 1118; 110 S. W. (2d) 503.

Burbridge v. *Crawford*, 195 Ark. 191; 112 S. W. (2d) 423.

Sanderson v. *Walls*, 200 Ark. 534; 140 S. W. (2d) 117.

(4) The defect that the certificate of the Clerk to the record of the delinquent list was not attached before the date of the sale was cured.

Foster v. *Reynold*, 195 Ark. 5, 110 S. W. (2d) 689.

Burbridge v. *Crawford*, 195 Ark. 191; 112 S. W. (2d) 423.

(c) Legal publication of the notice of sale for delinquent taxes was proved.

Sanderson v. *Walls*, 200 Ark. 534; 140 S. W. (2) 117.

Burbridge v. *Crawford*, 195 Ark. 191; 112 S. W. (2d) 423.

Union Bank & Trust Company v. *Horn*, 195 Ark. 481; 113 S. W. (2d) 1091.

II. Appellants Wood and Knowlton acquired vested rights by their deeds from the State of Arkansas.

Holland v. *Rogers*, 33 Ark. 251.

Campbell v. *Holt*, 115 U. S. 620; 29 L. Ed. 483; 6 Sup. Ct. 209.

Pearsall v. *Great Northern Railway Co.*, 161 U. S. 644; 40 L. Ed. 838; 16 Sup. Ct. 705.

St. Louis, Iron Mountain & Southern Ry. Co. v. *Alexander*, 49 Ark. 190; 4 S. W. 753.

Walker v. *Ferguson*, 176 Ark. 625; 3 S. W. (2d) 694.

Smith v. *Spillman*, 135 Ark. 279; 205 S. W. 107.

Massa v. *Nastri*, 125 Conn. 144; 3 Atl. (2d) 839; 120 A. L. R. 939.

Kosek v. *Walker*, 196 Ark. 656; 118 S. W. (2d) 575.

III. The repeal of Act 142 of the General Assembly of Arkansas for 1935 impaired the obligation of appellants' contracts with the State of Arkansas in violation of Article I, Section 10, of the Constitution of the United States.

Act 264 of the General Assembly of 1937, Vol. 1, page 933, approved March 17, 1937.

Berry v. *Davidson*, 133 S. W. (2d) 442; 199 Ark. 96.

Fletcher v. *Peck*, 6 Cranch 87; 3 L. Ed. 162.

Pacific Mail Steamship Co. v. *Joliffe*, 2 Wall. 450; 17 L. Ed. 805.

Poindexter v. *Greenhow*, 114 U. S. 270; 29 L. Ed. 185; 5 Sup. Ct. 903.

W. B. Worthen Co. v. *Kavanaugh*, 295 U. S. 56; 79 L. Ed. 1298; 55 Sup. Ct. 555.

Barnitz v. *Beverly*, 163 U. S. 118; 41 L. Ed. 93; 16 Sup. Ct. 1042.

Hans. v. *Louisiana,* 134 U. S. 1; 33 L. Ed. 842; 10 Sup. Ct. 504.

Osborn v. *Nicholson,* 80 U. S. (13 Wall.) 654; 20 L. Ed. 689.

New Jersey v. *Wilson,* 11 U. S. (7 Cranch) 164; 3 L. Ed. 303.

Davis v. *Gray,* 16 Wall. 203; 21 L. Ed. 447.

Terrett v. *Taylor,* 9 Cranch. 41; 3 L. Ed. 650.

Ettor v. *Tacoma,* 228 U. S. 148; 57 L. Ed. 773; 33 S. Ct. 428.

Pennoyer v. *McConnaughy,* 140 U. S. 1; 35 L. Ed. 363; 11 Sup. Ct. 699.

Reid v. *Federal Land Bank of New Orleans,* 166 Miss. 39; 148 Sou. 392.

State v. *Osten,* 91 Mont. 76; 5 Pac. (2d) 562.

State v. *Gether Co.,* 203 Wis. 311; 234 N. W. 331.

IV. The repeal of Act 142 of the General Assembly of Arkansas for 1935 deprived appellants of their property without due process of law, and denied them equal protection of the laws in violation of the Fourteenth Amendment.

Blair v. *Chicago,* 201 U. S. 400 at 484; 50 L. Ed. 801 at 836; 26 Sup. Ct. 427.

Beavers v. *Myar,* 68 Ark. 333; 58 S. W. 40.

Missouri Pacific Ry. Co. v. *Nebraska,* 164 U. S. 403; 41 L. Ed. 489; 17 Sup. Ct. 130.

Noble v. *Union River Logging R. Co.,* 147 U. S. 165; 37 L. Ed. 123, 13 Sup. Ct. 271.

Ettor v. *Tacoma,* 228 U. S. 148; 57 L. Ed. 773; 33 Sup. Ct. 428.

Campbell v. *Holt,* 115 U. S. 620; 29 L. Ed. 483; 6 Sup. Ct. 209.

Rhodes v. *Cannon,* 112 Ark. 6; 164 S. W. 752.

Carle v. *Gehl,* 193 Ark. 1061; 104 S. W. (2d) 445.

BRIEF AND ARGUMENT

I. *The effect of Act 142 of the General Assembly of Arkansas for 1935 was to cure all defects in the tax sale and vest a valid title in the State of Arkansas.*

For the convenience of the court, we again set forth in full the text of *Act 142 of the Acts of the General Assembly of Arkansas for 1935, volume 1, page 402, approved March 20, 1935,* which is as follows:

> "Section 1. Whenever the State and County taxes have not been paid upon any real or personal property within the time provided by law, and publication of the notice of the sale has been given under a valid and proper description, as provided by law, the sale of any real or personal property for the non-payment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; provided, that this Act shall not apply to any suit now pending seeking to set aside any such sale, or to any suit brought within six months from the effective date of this Act for the purpose of setting aside any such sale."

We have omitted from the above copy of the Act only the caption and title and the emergency clause which are not material to this discussion.

The rights claimed by appellants, Wood and Knowlton, are based upon the tax sale for State and County taxes held by the Collector of Desha County on June 12, 1933, at

which all of the lands involved in this case were struck off to the State of Arkansas (Record 26). It is appellants' contention that the effect of Act 142 of the General Assembly of Arkansas for 1935, set out above, was to cure all defects in this tax sale and to render the title acquired by the State of Arkansas valid and indefeasible.

This Act was first construed by the Supreme Court of Arkansas in the case of *Carle* v. *Gehl*, 193 Ark. 1061; 104 S. W. (2d) 445, decided in 1937 in which the constitutionality of the Act was attacked on the theory that the Act was a retroactive Statute of Limitations. The court held that it was not a Statute of Limitations, but a curative act and as such it was necessarily retroactive. The court pointed out that the Act undertook to cure only irregularities, informalities and omissions in the tax proceedings and that since these might have been dispensed with by the Legislature in the first instance, no constitutional rights were invaded when they were cured retroactively by the Act. We quote from the court's opinion as follows:

> "Within the well-recognized definition of curative act, Act No. 142 is one. That definition is as follows: 'A curative act is one intended to give legal effect to some past acts or transactions which are ineffective because of neglect to comply with some requirement of law.' This is clearly the purpose of Act No. 142 and, as such, is necessarily retroactive."

Again, in *Gilley* v. *Southern Corporation*, 194 Ark. 794; 110 S. W. (2d) 509, the court said of this Act 142 of 1935:

> "This was an act to cure irregularities and informalities and omissions in tax sales * * *.
>
> "This Act 142 was a *curative act*, and its purpose and effect was fully stated in the case of *Carle* v. *Gehl*,

supra, and will not be here repeated. It operated to cure substantially the same defects as did a confirmation decree under the confirmation Act No. 296 of the Acts of 1929."

In each of the following cases the Supreme Court of Arkansas referred one or more times to a tax title as having been "cured" by Act 142 of 1935.

Deaner v. *Gwaltney*, 194 Ark. 332, at 335; 108 S. W. (2) 600.

Lambert v. *Reeves*, 194 Ark. 1109, at 1118; 110 S. W. (2d) 503.

Foster v. *Reynolds*, 195 Ark. 5; 110 S. W. (2d) 689.

Wallace v. *Todd*, 195 Ark. 134; 111 S. W. (2d) 472.

Burbridge v. *Crawford*, 195 Ark. 191; 112 S. W. (2) 423.

Kansas City Life Ins. Co. v. *Moss*, 196 Ark. 553; 118 S. W. (2d) 873.

Sanderson v. *Walls*, 200 Ark. 534; 140 S. W. (2d) 117.

These cases are cited to show that the Supreme Court of Arkansas is definitely committed to the doctrine that Act 142 of 1935 is a curative act since the opinion in the case at bar (Record 36-39) is somewhat ambiguous on this point. By the above decisions it is made plain that the effect of the Act was to cure tax sales regardless of whether or not the Act was styled a curative act.

We next address ourselves to a consideration of whether the Act was effective to cure the defects shown by the record in the case at bar. In this connection we call to the court's attention the following statement in the opinion of the Supreme Court of Arkansas (Record 37), "It is con-

ceded by appellee that the defects and irregularities alleged are such as would not justify the court in setting the tax sale aside under said Act 142, if it were in force." Although no formal concession to this effect appears in the record, appellee has never made any effort to show that the defects complained of in the tax sale involved in this case were not such irregularities, informalities or omissions as fall within the terms of Act 142 of 1935. However, we shall briefly consider the defects shown by the record and point out cases in which the Supreme Court of Arkansas has held that each of these defects was remedied by the provisions of Act 142. These defects are as follows:

(1) The tax books were not delivered by the County Clerk to the Collector of taxes until January 16, 1933, and the Clerk's warrant was not attached until the same date, this being after the second Monday in January prescribed by law (Record 23).

In the following decisions the Supreme Court of Arkansas has held that these facts constituted mere informalities and irregularities which were cured by Act 142 of 1935 and that titles acquired from the State while that Act was in force could not be attacked on these grounds by the former owner:

Deaner v. *Gwaltney*, 194 Ark. 332; 108 S. W. (2d) 600.

Gilley v. *So. Corp.*, 194 Ark. 794; 110 S. W. (2d) 509.

Wallace v. *Todd*, 195 Ark. 134; 111 S. W. (2d) 472.

Kansas City Life Ins. Co. v. *Moss*, 196 Ark. 553; 118 S. W. (2d) 873.

(2) The Collector's certificate was not attached to the delinquent list returned by him; and (Record 25)

(3) The record does not show the filing date of the delinquent list (Record 25).

Each of these defects has been held to be a mere informality or irregularity which is cured by Act 142 in the following cases:

Lambert v. *Reeves*, 194 Ark. 1109, at 1118; 110 S. W. (2d) 503.

Burbridge v. *Crawford*, 195 Ark. 191; 112 S. W. (2d) 423.

Sanderson v. *Walls*, 200 Ark. 534; 140 S. W. (2d) 117.

(4) The certificate of the Clerk to the record of the notice of the delinquent list was attached on the date of the sale and not before that date (Record 26).

This was held to be an informality cured by Act 142 in the following cases:

Foster v. *Reynolds*, 195 Ark. 5; 110 S. W. (2d) 689.

Burbridge v. *Crawford*, 195 Ark. 191; 112 S. W. (2d) 423.

It may be observed that in this latter case, *Burbridge* v. *Crawford*, every defect which was alleged in the complaint in the case at bar was set up and the court held all of these to have been cured by Act 142, with the single exception of the allegation that the publication of the notice of sale was not given as provided by law.

The court will observe that legal publication is prerequisite to the operation of Act 142 quoted above. Although it was alleged in appellee's complaint (Record 4-5)

that the notice was not published as required by law, this was not proved; on the contrary the record shows by a certificate of the County Clerk that the notice of the tax sale was published for the time and in the manner required by law, by publication in the Desha County Democrat in the issues of May 18th and May 25, 1933, and was also published in the McGehee Times in the issues of May 18th and June 1, 1933 (Record 26). Either of these publications would have been sufficient as was held in *Sanderson* v. *Walls*, 200 Ark. 534; 140 S. W. (2d) 117.

In *Burbridge* v. *Crawford*, 195 Ark. 191; 112 S. W. (2d) 423, it was held that the certificate of the Clerk (Record 26) as to publication is conclusive on this question, and in *Union Bank & Trust Company* v. *Horn*, 195 Ark. 481, 113 S. W. (2d) 1091, it was held that the fact that the certificate was made and entered after the time provided by law does not rob it of its probative value to establish the fact that the notice was published.

We do not find any other facts in the record which show any defects in the tax sale and no other grounds than those we have cited above have been raised or argued at any point in the proceedings. It therefore appears to be beyond dispute that the State of Arkansas while Act 142 was in full force and effect had a good and valid title to the lands involved in this case. Therefore, since the Act was in full force and effect on July 20, 1936, the date of the conveyance to the appellant Knowlton and on July 29, 1936, the date of the conveyance to the appellant Wood, it necessarily follows that the State had a good title at the time of these conveyances.

II. ***Appellants Wood and Knowlton acquired vested rights by their deeds from the State.***

On July 20, 1936, the Commissioner of State Lands conveyed to the appellant, J. H. Knowlton, with other lands, the 106.66 acres which are involved in this appeal (Record 30-31). On July 29, 1936, the Commissioner of State Lands conveyed to the appellant, J. H. Wood, 240 acres claimed by him (Record 28-29). The deeds were in the regular statutory form and no contention is made as to the authority of the State Land Commissioner to make the conveyances or as to the form of the deeds.

The argument was advanced by the appellee in the court below that the State deed is only a quitclaim. This is true, but under the laws of the State of Arkansas a quitclaim deed is a valid and effectual conveyance and conveys the grantor's title just as fully as a warranty deed. Under the deeds from the Commissioner of State Lands, the appellants acquired all the right, title and interest of the State in and to the lands which, as we have shown in the first section of this brief, was a valid title. In the early case of *Holland* v. *Rogers*, 33 Ark. 251, the Supreme Court of Arkansas stated the rule as to conveyances by quitclaim deeds which has remained the law of the State to this date. We quote from this opinion as follows:

> "A simple bargain and sale of land, in writing, in words of the present, and without any more is a conveyance, operating under and by virtue of the statutes of uses, always upon sufficient consideration. It was devised in England, as a common assurance, soon after the passage of the statute (see Blackst. Com. Book 2, p. 338) and has become the most common mode

of conveyance in the United States. It is more than a quit claim, or a release; it actively effects a divestiture of title from the grantor, and transmits it to the grantee, with or without convenants of warranty, and it is no less a conveyance in the strictest sense because it may also have clauses of quitclaim or release."

Appellants contend that by their deeds from the Commissioner of State Lands they acquired a legal and equitable title to the lands involved in this case and that these were vested rights within the protection of the Constitution. The term "vested rights" has been used in many senses and has been held to comprehend many different types of rights. We believe, however, that from the earliest times when the term was used there has never been the slightest doubt that any title or right in real property once definitely fixed in a known person is within the meaning of the term "vested rights." No matter how narrow or technical the definition of the term, the title to land has always been the most sacred in the eyes of our law of all vested rights of property. This was recognized when the Supreme Court of the United States in *Campbell* v. *Holt*, 115 U. S. 620; 29 L. Ed. 483; 6 Supreme Court 209, in which the court had under consideration the question of whether the State Legislature might constitutionally enlarge the period of limitations against an action on a contract when the period allowed by the previous Statute of Limitations had already expired. It was held that this is within the power of the Legislature, but the court recognized that rights in property of a tangible nature were different. The court pointed out that once a title to real estate has vested it cannot thereafter be divested by any repealing Act, saying:

"It may, therefore, very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the Statute of Limitations by a legislative act passed after the bar has become perfect, such Act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing Act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the Act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law."

The definition of vested rights most commonly accepted and quoted is that found in *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 644; 40 L. Ed. 838; 16 Supreme Court 705, in which the court quoted from Fearne, Kent and Cooley the definitions that are recognized by the Supreme Court of the United States have since become the generally accepted tests of vested rights. The court said:

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate fixed right of present or future enjoyment'; and by Chancellor Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment' (4 Kent's Com. 202). It is said by Mr. Justice Cooley that 'rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment present or prospective has become the property of some particular person or persons as a present interest'."

We also call to the court's attention the following statement in the opinion in that case:

"Indeed, the sanctity of charters, vesting in grantees the title to lands or other property has been vindicated in a large number of cases."

The Supreme Court of Arkansas has repeatedly recognized that the rights acquired by purchasers of tax titles in the State are vested rights within the constitutional protection. In *St. Louis, Iron Mountain and Southern Railway Co.* v. *Alexander,* 49 Ark. 190; 4 S. W. 753, a tax purchaser had bought a tax title while a law was in effect providing that in the event of failure of the title the purchaser was entitled to reimbursement of all sums paid out by him. It was contended that the law relative to reimbursement had subsequently been repealed, but the Supreme Court of Arkansas held that the rights acquired were vested rights which could not be disturbed, saying:

> "The plaintiff's right to recover all that was adjudged to him had vested before the repealing act was passed. The law in force when the sale was made, regulating its obligations and defining the rights of the purchaser—all the provisions beneficial to him and constituting a material inducement to the purchase—entered into and became a part of his contract, and so passed beyond the legislative control. Cooley on Tax., 2d ed., p. 545; Blackwell on Tax Titles, 4th ed., 430-1, 299; *Nelson* v. *Rountree,* 23 Wis. 371; *Louisiana* v. *Fiske,* 116 U. S. 131.
>
> "If the contract can be changed in one particular it can in all, and if the legislature can relieve the proprietor or the land of a part of the obligation to reimburse the tax purchaser, it can deprive him of the right of reimbursement in toto. 'To admit such a right,' says the Supreme Court of Mississippi in *Moody* v. *Hoskins,* 1 Southern Reporter, 622, 'is to concede the power to transfer valuable rights from one to another by the easy process of legislative declaration. . . . This is not legislation but confiscation, and is beyond the power of the legislature.'"

In *Walker* v. *Ferguson,* 176 Ark. 625; 3 S. W. (2d) 694, the Supreme Court of Arkansas said:

"Where lands are sold at a tax sale and are struck off to a private purchaser, the sale for the delinquent taxes constitutes a contract between the purchaser and the state, or the instrumentality of the state, the obligation of which cannot be impaired by subsequent legislation extending the period of the right to redeem."

In *Smith* v. *Spillman*, 135 Ark. 279; 205 S. W. 107, the court held that the purchaser at a judicial sale for taxes acquired a vested right which could not thereafter be impaired by extending the time allowed for redemption.

It is well established that a legal defense to a cause of action is a vested right in the same sense that a legal right to affirmative acts is a vested right; that this is particularly true to defenses pertaining to real estate is shown by *Campbell* v. *Holt*, 115 U. S. 620; 29 L. Ed. 483; 6 Supreme Court 209. In *Massa* v. *Nastri*, 125 Conn. 144; 3 Atl. (2d) 839; 120 A. L. R. 939, a very recent case, the Supreme Court of Connecticut held that a defense to a tort action created under the so-called guest statute, was a vested right which could not be defeated by repeal of the statute. The opinion is a scholarly one and many authorities are cited upholding the position that a defense is as much a vested right as any other.

We have gone at some length into the question of what constitutes vested rights because the opinion of the Supreme Court of Arkansas in this case seems to be predicated upon the assumption that the appellants acquired no vested rights by their tax deeds. No authority for this position was cited by the Supreme Court of Arkansas except its own decision in *Kosek* v. *Walker*, 196 Ark. 656; 118 S. W. (2d) 575, in which no authority whatever was cited for the assertion. The court states in its opinion in the case at bar

(Record 38) "We think appellants acquired no greater vested interest or title to said lands than the State had." This, however, is exactly what the appellants are contending because the State at the time it sold the land to appellants had a perfect and indefeasible title as we have shown in the first section of our brief.

The State, having a good title, sold it to appellants. It must therefore be conceded that appellants acquired by this conveyance and had as long as Act 142 of 1935 remained in effect a valid title. By the terms of that Act this title could not "be set aside by any proceeding at law or in equity," on any of the grounds which are the basis of this suit.

Appellants strongly insist that this title in fee simple, unassailable at law or in equity, constituted the most solemnly vested of all rights of property.

III. *The repeal of Act 142 of the General Assembly of Arkansas for 1935 impaired the obligation of appellants' contracts with the State of Arkansas in violation of Article I, Section 10, of the Constitution of the United States.*

It appears from the record in this case that the State of Arkansas, having acquired the lands herein involved by tax sale on June 12, 1933 (Record 26), subsequently enacted by its Legislature an Act designed to give it a valid title to the lands along with others. Thereupon, having validated its title, it sold and conveyed the lands to the appellants, Wood and Knowlton, thereby vesting in them a good and valid title. Then, in March of 1937 after having

accepted the purchase money and parted with its title, the State through its Legislature enacted *Act 264 of the General Assembly of 1937, volume 1, page 933, approved March 17, 1937,* which repealed Act 142 of 1935. This Act 142 of 1935 was the foundation of the title which the State had sold to the appellants since it cured the defects which otherwise rendered the title valueless. The effect of the repealing Act, if it be construed retroactively in accordance with the ruling of the Supreme Court of Arkansas, is to destroy the title which was the consideration for the contract of purchase between the appellants and the State of Arkansas.

In order that the court may fully understand the reasons which led to the enactment of Act 142 of 1935 and the important part which that Act played in this tax purchase, it is necessary to consider the situation which prevails in Arkansas as to tax titles. This is reviewed at length in *Berry* v. *Davidson,* 133 S. W. (2d) 442; 199 Ark. 96, where the court was considering another confirmation act passed by the Legislature in 1935. It was well pointed out that for many years tax forfeitures and sales of land in the State had been almost universally ineffectual to convey title and as a result there was a general contempt for the taxing laws. Consequently, there was a great loss in the collection of taxes and the State found it almost impossible to dispose of lands which had been forfeited to it for nonpayment of taxes. The result was that these forfeited lands remained in the hands of the State, producing no revenue, as they were exempt from current taxes although the forfeiture might be void. It was with a view to remedying these evils that Act 142 of the General Assembly of Arkansas for 1935 together with other confirmation acts was passed. Their purpose was to encourage persons to buy

tax titles from the State, thereby producing revenue for the State in the first instance, and restoring the lands to the tax books as tax producers thereafter. A secondary effect was to inculcate in taxpayers a fear of the consequences of failure to pay their taxes.

With these circumstances in mind, it is easy to see that the benefits of Act 142 of 1935 were a material inducement to appellants in the purchase of these lands and constituted a part of the consideration for the contract of purchase. Since knowledge of the law is presumed, it must be presumed that the appellants acted with full knowledge of the beneficial features of the Act and it may well be assumed that they would not have purchased the land had the Act not been in effect, since the titles would admittedly have been invalid but for said act.

We therefore take the position that the repeal of Act 142 of 1935 when given retroactive effect, directly impaired the obligation of the contract between appellants and the State of Arkansas.

In our view, the whole question at issue in this case was resolved in appellants' failure by the landmark decision in *Fletcher* v. *Peck*, 6 Cranch. 87; 3 L. Ed. 162. In that case the State of Georgia through its Legislature authorized a conveyance to provide persons with certain lands then held by the State. At a later session an attempt was made to nullify the conveyances which had been made by repealing the law authorizing them. The situation is very similar to that in the case at bar, although in this case the law authorizing the conveyances was not repealed. The repeal of Act 142 had the same effect because it struck down the title which had been conveyed and conveyances

authorized were mere nullities. The same decision by Justice Marshall also established the fact that a grant of land is a contract within the protection of Article I, Section 10, of the Constitution. The following quotation from that opinion might equally well apply to the case at bar:

"Is a grant a contract?

". . . A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right.

"Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances" (Page 136).

In *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall. 450; 17 L. Ed. 805, the court had under consideration a Statute of the State of California which gave harbor pilots the right to certain fees. The Statute was subsequently repealed and the contention was made that this divested the right to fees already determined. The court said:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Another leading case is *Poindexter* v. *Greenhow*, 114 U. S. 270; 29 L. Ed. 185; 5 Supreme Court 903. The Statute there under consideration was an Act of the State of Virginia repealing a previous Act authorizing the issue of bonds in which it was provided that the bonds might be used in the payment of taxes. The court held that the right given by Statute to use the bonds for that purpose was a vested right under the contract which could not be impaired. In refuting the argument advanced by the State, the court quoted from the famous cases of *Fletcher* v. *Peck*, 6 Cranch. 87, and *Marbury* v. *Madison*, 1 Cranch. 137, as follows:

"'When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired may be seized without compensation? To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of a legislative power, is well worthy of serious reflection.' And, in view of such a contention, we may well add the impressive and weighty words of the same illustrious man, when he said, in *Marbury* v. *Madison*, 1 Cranch. 137: 'The

Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.' "

It is, of course, fundamental that the laws of a State in force when a contract is made become a part of the contract the same as if they were written into it, and that an impairment of those laws impairs the contract just as much as a direct impairment of the subject matter. As Justice Cardozo said in *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56; 79 L. Ed. 1298; 55 Supreme Court 555, "To know the obligations of a contract, we look to the laws in force at its making."

In *Barnitz* v. *Beverly*, 163 U. S. 118; 41 L. Ed. 93; 16 Supreme Court 1042, the question at issue was whether a State Legislature might extend the period of redemption allowed in a case of mortgage foreclosures. It was held that a Statute to this effect was unconstitutional as applied to mortgages in effect at the time of its passage. The case is closely analogous to the one at bar because these actions to cancel tax deeds are in their essential nature nothing more or less than suits to redeem the property, and any Statute which extends the period of time allowed to redeem from the purchase, or creates a right to redeem where none existed before, as in the case at bar, is exactly similar to that involved in *Barnitz* v. *Beverly, supra.* From that decision we quote as follows:

> "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and form a part of them as the result of the obligation to perform them

by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform a thing contracted for, and gives the other the right to enforce the performance by the remedy then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party and to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

In this connection it may be appropriate to note the statement from *Hans* v. *Louisiana*, 134 U. S. 1; 33 L. Ed. 842; 10 Supreme Court 504, where the court said:

"Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to effect their enjoyment."

In *Osborn* v. *Nicholson*, 80 U. S. (13 Wall.) 654; 20 L. Ed. 689, an Arkansas case, the court had under consideration the effect of the Arkansas Constitution of 1868 which annulled all contracts for the sale of slaves. The question was whether this provision of the Constitution was valid as applied to contracts made when such sales were legal. The action being for the purchase money due under such a contract, the court said:

"Rights acquired by a deed, will or contract of marriage, or other contract executed according to stat-

ute, subsequently repealed, subsist afterwards as they were before, in all respects as if the statutes were still in force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities."

We might multiply decisions of the Supreme Court of the United States on the same point without end. To call the court's attention to a few of the outstanding decisions similar in their nature to the instant case, we mention the following:

New Jersey v. *Wilson*, 11 U. S. (7 Cranch.) 164; 3 L. Ed. 303,

in which it was held that where lands were exempted from taxation by the State Legislature and purchased while the exempting act was in effect a subsequent act repealing the exempting clause impaired the obligation of the contract and was unconstitutional. The same rule has been laid down in many subsequent cases.

In *Davis* v. *Gray*, 16 Wall. 203; 21 L. Ed. 447, the State of Texas had chartered a railway company and granted it land and it was held that subsequent constitutional provisions of the State rendering such grants void impaired the obligation of the contract and were unconstitutional.

In *Terrett* v. *Taylor*, 9 Cranch. 41; 3 L. Ed. 650, it was held that a legislative grant of property to a church created a vested right which could not be divested by subsequent legislation. In *Ettor* v. *Tacoma*, 228 U. S. 148; 57 L. Ed. 773; 33 Supreme Court 428, it was held that where a statute gave property owners a right to damages for the changing of a grade of a street, the repeal of the statute could not divest the right to recover for damages already done.

In *Pennoyer* v. *McConnaughy*, 140 U. S. 1; 35 L. Ed. 363; 11 Supreme Court 699, it was held that the repeal of an Oregon Statute authorizing purchase of swamp lands impaired the obligation of the contract with an applicant for the lands even though he had not paid for them.

Three decisions from State Supreme Courts involving tax sales may be of interest in this discussion. These are:

Reid v. *Federal Land Bank of New Orleans*, 166 Miss. 39; 148 Southern 392.

State v. *Osten*, 91 Mont. 76; 5 Pac. (2d) 562.

State v. *Gether Co.*, 203 Wis. 311; 234 N. W. 331.

All of these cases hold that the laws regarding tax sales in force when the sales are made become a part of the contract between the purchaser and the State and cannot be repealed by subsequent legislation.

Summarizing, we believe that it is evident that the provisions of Act 142 of 1935, which was in effect at the time the State of Arkansas by its Land Commission sold the lands herein involved to the appellants, Wood and Knowlton, entered into and became a part of the contract of purchase between the State and appellants. This contract falls squarely within the protection of Article I, Section 10, of the Constitution of the United States prohibiting the States from passing laws which impair the obligation of contracts. The repeal of Act 142 of 1935 materially and substantially impaired the obligation of appellants' contract and in fact, rendered the purchase of the lands nugatory. Therefore, the repealing act, being Act 264 of the General Assembly of Arkansas for 1937, is unconstitutional and void and the appellants have a good and valid title to the lands involved in this appeal.

IV. *The repeal of Act 142 of the General Assembly of Arkansas for 1935 deprived appellants of their property without due process of law, and denied them equal protection of the laws in violation of the Fourteenth Amendment.*

It is difficult to segregate the cases in which laws of this character have been struck down, because they violate the Fourteenth Amendment, from those which reach the same result on the ground that the statutes impair the obligation of contracts. Ordinarily when the rights involved arise out of contracts and are property rights, any statute which infringes the one provision will also infringe the other. Many cases content themselves with saying that the rights are vested rights which cannot be disturbed.

In this section of our brief we shall endeavor to present cases in which statutes similar to Act 264 of the General Assembly of Arkansas for 1937 have been held to offend the Fourteenth Amendment by depriving litigants of their property without due process of law and by denying them equal protection of the laws. In this connection it must be observed that prior to the date of enactment of Act 264 of 1937, the appellants, Wood and Knowlton, by virtue of their conveyances from the State of Arkansas stood seized of a perfect title so far as this record shows. This proposition has never been denied at any point in this litigation and was conceded by the Supreme Court of Arkansas in its opinion (Record 37). The former owner of the lands had completely lost its title by virtue of its failure to pay the taxes due on the lands, and the enactment of Act 142 of 1935. Then, on the date of enactment of the statute repealing Act 142 of 1935, this unassailable, legal

and equitable title was divested out of appellants and restored to the former owner through the process of taking from the appellants a good and valid defense to this cause of action and restoring to the former owner a ground for suit which had been lost. Appellants' title was converted into a mere shadow and the groundless claims of the original owner became a title. In other words, without any opportunity to be heard or any day in court, or any compensation, appellants found that their property had been taken from them and given to the Alliance Trust Company without any justification of public use or necessity. It must be remembered that this repeal of Act 142 did not simply restore the parties to the *status quo ante*. Wood and Knowlton had not bought the property at the time of enactment of Act 142 of 1935 and had no interest in it. It is not the case where the statute gratuitously bestowed benefits upon them and in the same manner took them away. When they bought the property the Act was in full force and effect, having been passed more than a year prior to that time. No doubt the State had a perfect right as long as it was the owner of the lands to return them to the former owner by the simple process of repealing the law, by which it acquired title to the property. This was the basis of decision in *Kosek* v. *Walker*, 196 Ark. 656, upon which the Supreme Court of Arkansas relied as authority for its opinion in the instant case (Record 38), but here we have a different state of facts. Wood and Knowlton acquired the property when Act 142 was in full effect and were complete strangers to the title. Repeal of Act 142 did not restore them to their former rights, but left them entirely without rights if the repealing act is valid.

We have found only one decision of the Supreme Court of the United States passing directly upon the specific question involved in this case, that is, upon the effect of the repeal of a curative act on those claiming rights under that Act. This case is *Blair* v. *Chicago*, 201 U. S. 400 at 484; 50 L. Ed. 801 at 836; 26 Supreme Court 427. The facts in that case are very involved and we will not attempt to set them out, other than to say that the question at issue was the validity of certain ordinances and contracts of the City of Chicago relating to street railways. One of the contentions raised was that the city had authority under existing laws to grant charters only for horse railways, whereas the charters granted embraced railways with mechanical power. It seems that in 1897 a curative act by the Illinois Legislature ratified the charter so granted. Subsequently the curative act was repealed and it was contended that the charters or contracts thereupon became invalid. The court said:

> "Furthermore, on June 9, 1897, the Legislature passed an Act having application to companies organized under general or special laws, which provided: 'Every such street railway may be operated by animal, cable, electric or any other motive power that may have been or shall hereafter be granted to it by the proper officers or authorities, except steam locomotives engines.' It is true that this statute was repealed by the Act of March 7, 1899, but we do not perceive how this could destroy its effect to ratify the contracts which were in existence when the Act was passed."

We find one other case which deals directly with the point at issue. Strangely enough, this is a decision of the Supreme Court of Arkansas, but although the case was cited and argued to the Court in our original brief, reply brief and brief on rehearing as controlling the instant case,

it was never referred to by the court. The case is *Beavers* v. *Myar*, 68 Ark. 333; 58 S. W. 40. The Act there involved was the Act of the General Assembly of Arkansas of April 13, 1893, which had the effect of curing all conveyances which were defective because of failure to comply with a previous Act requiring that the wife join in conveyances of the homestead by the husband. The plaintiff in that case held a mortgage executed by the defendant which had been cured under the provisions of the Act of 1893. But an Act of April 19, 1899, of the General Assembly of Arkansas attempted to repeal the curative act of 1893. Thereafter, plaintiff attempted to foreclose his mortgage and the defendant set up as a defense the claim that the mortgage was void because his wife had not joined in it. On appeal the Supreme Court of Arkansas said:

> "Under the act of April 13, 1893, the appellee's rights under the trust deed vested, and could not be divested by subsequent legislation. Therefore the act of April 19, 1899, repealing the act of April 13, 1893, did not have the effect to divest the rights of the appellee, which vested under the said act of April 13, 1893. An Act of the Legislature will not be construed to have a retroactive effect, if susceptible of any other construction. *Couch* v. *McKee*, 6 Ark. 484; *Fayetteville B. & L. Assn.* v. *Bowlin*, 63 Ark. 573; Cooley, Constitutional Lim. (4th Ed.) 411, and cases cited. 'Rights conferred by statutes are determined according to the law which was in force when the right accrued, and are not in any manner affected by subsequent legislation.' *Porter* v. *Hamley*, 10 Ark. 195; *St. L. I. M. & S. Ry. Co.* v. *Alexander*, 49 Ark. 192; Wade, Retroactive Laws, Sec. 34. The Legislature possesses no power to divest legal or equitable rights previously vested. *Brown* v. *Morison*, 5 Ark. 217; *Dash* v. *Van Kleeck*, 7 Johns. 477."

In *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; 41 L. Ed. 489; 17 Supreme Court 130, this court said:

> "The taking by the State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment to the Constitution of the United States."

In *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165; 37 L. Ed. 123; 13 Supreme Court 271, it was held that where the Secretary of the Interior had approved the grant of a right-of-way to a railroad across lands under his jurisdiction, revocation of his approval by his successor in office deprived the company of its property without due process of law even though the grant had not been fully consummated.

We have already referred to *Ettor* v. *Tacoma,* 228 U. S. 148; 57 L. Ed. 773; 33 Supreme Court 428, holding that the statutory right to damages for change of a street grade could not be divested by repeal of the statute after the change in grade had been made.

We think the case at bar is most like *Campbell* v. *Holt,* 115 U. S. 620; 29 L. Ed. 483; 6 Supreme Court 209, from which we have already quoted the statement that where title to real property has vested by operation of a Statute of Limitations, the repeal of that statute cannot divest the title acquired under it. Although the Supreme Court of Arkansas has held that Act 142 of 1935 is not a Statute of Limitations but a curative act, its obligation and effect in no wise differ from that of a Statute of Limitations. Either completely bars the right to recover land after the Act has become effective. There can be no logical basis for holding

that the one cannot be repealed but the other can. If the curative act can be repealed, the rights divested and the result accomplished would be exactly the same as if the Statute of Limitations were repealed.

It may be interesting to note that in *Rhodes* v. *Cannon*, 112 Ark. 6; 164 S. W. 752, the Supreme Court of Arkansas went even farther than the Supreme Court of the United States in *Campbell* v. *Holt*, *supra*, in holding that rights acquired by a Statute of Limitations cannot be disturbed. In the Rhodes case a mortgage on real estate had become barred by the Statute of Non-claims by failure to prove the indebtedness secured by the mortgage as a claim against the estate of the deceased mortgagor. A subsequent session of the Legislature amended the Statute of Non-claims so as to provide that the failure to prove the mortgage debt against the estate did not bar the right to foreclose the mortgage, but only the personal right to recover against the general estate. It was contended that the Act was retroactive and revived the right to foreclose the mortgage which under the previous decisions should have been held to be barred. The court considered numerous decisions and concluded that it was beyond the power of the Legislature to deprive the defendants of a vested defense and revive the cause of action, saying:

> "The proposition that the Legislature has the power to take the property of one man and transfer it to another is at once monstrous and absurd. And what is the difference between the proposition and the one that the Legislature has the power to deprive a man of legal defense against a demand set up against him? In the first case, the action would be direct and fully understood; in the second it would be indirect, taking the property of the defendant under the form

of judicial sentence by depriving him of a valid defense against a demand invalid in law."

Practically all of the foregoing authorities were cited in our briefs in the Supreme Court of Arkansas, but that court in its opinion (Record 37-38) did not refer to or distinguish any of them. Two grounds were advanced by the court as the reasons why the constitutional argument advanced was fallacious. The first is that Act 142 of 1935 did not apply to all tax sales because those involved in pending suits and in suits which might be brought thereafter, within six months, were excluded from the operation of the Act. Neither of these classes included the case at bar and as the court stated in its opinion (Record 37) the Act would have applied to this tax sale if it were in force. It is not unusual for curative acts to exclude pending suits and those which may be brought within a reasonable length of time after passage of the Act. This fact in no manner affected the rights acquired by the appellants by virtue of the curative act, since no suit was pending affecting this sale at the time of the passage of the Act and appellants did not buy the property until after the expiration of the six months period, during which no suit was brought. This ground for the opinion of the court below is patently fallacious. The second ground advanced by the Supreme Court of Arkansas for its opinion is that appellants acquired no vested rights by their purchase of the lands prior to the repeal of Act 142. It is stated that the "appellants acquired no greater vested interest or title to said lands than the State had." While this is true, the State at that time had a perfect title which was exactly what the appellants acquired. They could not have acquired any greater interest. A perfected title is the *ne plus ultra* of rights in

land. It goes without saying that perfection cannot be improved. The court advances no reasons and cites no authorities for its holding that the rights acquired by appellants were not vested. It needed to go no further than its own decisions to find ample authority holding that these rights could not in any manner be impaired. We submit that the opinion of the court below is obviously in error on this point.

The proposition on which appellee relies amounts to this: The State of Arkansas having acquired a title which is defective because of technical informalities and irregularities, not amounting to any substantial rights, can cure that title by legislation in order to induce innocent purchasers to buy the land from it. Then having cured the title and thereby disposed of the land to its benefit, the State has the power to undo its previous actions to the damage of those who have dealt with it in good faith. We submit that no such action will be countenanced by this court.

We do not anticipate that any question of the validity of Act 142 of 1935 will be raised in this litigation since none is raised by the pleadings and none has at any time been advanced in argument either in the trial court or in the Supreme Court of Arkansas. It may not be amiss, however, to say that the defects in the tax sale which were cured by Act 142 of 1935 were the slightest kind of technical, formal irregularities which could not in any manner have prejudiced any rights of the property owner. The Legislature might have dispensed with these formalities before the sale and it could equally well dispense with them afterwards. The validity of the Act under both the Federal and the State Constitutions was thoroughly con-

sidered in *Carle* v. *Gehl*, 193 Ark. 1061; 104 S. W. (2d) 445, and it was upheld. We do not believe it would be competent for the appellee to raise any question on this point at this stage of the proceedings since none have been raised heretofore, but we make this comment in case such a question should be raised.

In conclusion, we submit that Act 142 of the General Assembly of Arkansas had the effect of curing all defects in the tax sale involved in the instant case and vesting in the State a valid title to the lands involved in this appeal. The State sold these lands to the appellants, Wood and Knowlton, while the Act was in effect, and they thereby acquired vested rights in the lands. Therefore, Act 264 of the General Assembly of Arkansas for 1937 attempting to repeal Act 142 of 1935 must be held to be invalid and unconstitutional: First, because it impairs the obligation of appellants' contract with the State of Arkansas in violation of Article I, Section 10, of the Constitution of the United States, and, second, because it deprives appellants of their property without due process of law and denies them equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

J. G. Burke,

Counsel for Appellants.

BLANK PAGE